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OUTSTANDING ITEMS

CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS ON IMPLEMENTATION, IN ACCORDANCE WITH ARTICLE 27 OF THE CONVENTION, WITH A VIEW TO DECIDING HOW TO TAKE THIS MATTER FORWARD

CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES, IN ACCORDANCE WITH ARTICLE 28, PARAGRAPHS 2 (a) AND 6, OF THE CONVENTION

Note by the secretariat

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I. INTRODUCTION

A. Foreword

1. By its decision 20/COP.3, the Conference of the Parties decided, in accordance with articles 27 and 28 of the Convention, to convene during its fourth session an open-ended ad hoc group of experts to examine and make recommendations, taking into account the documents prepared by the secretariat and in the light of progress of the negotiations on the same matters in other relevant environmental conventions, on the following issues: (a) procedures for resolution of questions on implementation; (b) annex on arbitration procedures; (c) annex on conciliation procedures.

2. In the same decision, the Conference of the Parties invited Parties to communicate their views to the secretariat in writing on how to take this matter forward. The Conference of the Parties also requested the secretariat to compile these views for consideration by the Conference of the Parties at its fourth session and to update the information contained in ICCD/COP(3)/7 and ICCD/COP(3)/18, as necessary, to reflect the progress achieved in this area in other relevant conventions, and to prepare new documents for consideration at its fourth session.

3. Due to time constraints during COP.4, by its decision 20/COP.4, the Conference decided to reconvene the meeting of the open-ended ad hoc group of experts at COP 5. In the same decision, Parties were also invited to communicate to the secretariat their views on how to take this matter forward. The secretariat was requested to incorporate such additional views into a revised version of ICCD/COP(4)/8 and to update the information contained in the document referred to above, as necessary, to reflect the progress achieved in this area in other conventions, and to prepare revised documentation for consideration by the Conference of the Parties at its fifth session.

4. The present document is composed of three parts. The introduction containing the note by the secretariat and background information on the resolution of questions on implementation and on the annexes on arbitration and conciliation procedures. Part II, on resolution of questions on implementation, consists of written proposals by Parties, relevant precedents and new developments which may be taken into account for further discussions. Part III, on the annexes on arbitration and conciliation, is also divided into submissions by Parties, relevant precedents and new developments.

5. The present note integrates and updates document ICCD/COP(4)/8. More particularly, it provides current information with regard to the relevant precedents cited in that document, as well as information on new developments. The present document does not reproduce written proposals contained in the above-mentioned document and other sections. Neither does this note reproduce last year's proposals by Parties on the consideration of annexes containing arbitration and conciliation procedures, nor sections on the status of the texts of the annexes proposed by the secretariat, and the procedure for their adoption. However, all these sections remain relevant for the purpose of assisting the COP in its deliberations on formulating procedures and mechanisms required for the purposes of articles 27 and 28 of the UNCCD.

B. Background information

6. Article 27 of the Convention provides that: "The Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention."

7. Provisions of that type are generally considered to be a relatively new feature of environmental conventions. They are an attempt to pre-empt and avoid confrontation which might trigger more formal dispute resolution procedures. They are thought to be particularly well suited to global environmental regimes, where many Parties share an interest in the effective implementation of the Convention's objectives.

8. The pre-emptive and consensual approach is becoming the practice in certain new environmental treaties, especially when non-implementation stems from lack of capacity or inadvertence. Because procedures for the resolution of questions remain within the jurisdiction of a convention's governing body, they are generally considered to be a means of enabling Parties to a convention to discuss its implementation in a constructive and cooperative manner in order to secure amicable solutions.

9. Article 28 of the Convention provides that, when ratifying, accepting, approving, or acceding to the Convention, or at any time thereafter, a Party other than a regional economic integration organization may declare in a written instrument that, in respect of any dispute concerning the Convention, it recognizes arbitration and/or submission to the International Court of Justice as a compulsory means of dispute settlement in relation to any Party accepting the same obligation. Article 28 further provides that, if the Parties to a dispute have not accepted the same or any procedure and if they have not been able to settle their dispute within 12 months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute.

10. Owing to pressure of time during the negotiation of the Convention, it was not possible to include annexes on conciliation and arbitration as part of the original text. Hence, paragraphs 2 and 6 of article 28 provide that arbitration and conciliation shall be in accordance with "procedures adopted by the Conference of the Parties in an annex as soon as practicable".

11. At its second session, the Conference of the Parties, by decision 2/COP.2,[1] decided to include as a selected item on the agenda for its third and, if necessary, fourth session, consideration of the above-mentioned issues. By decision 22/COP.2, the Conference of the Parties also decided to consider these issues further in the light of the progress of the negotiations on the same issues in other relevant environmental conventions with a view to deciding how to take this matter forward.

II. CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS OF IMPLEMENTATION

A. Submissions by Parties[2]

1. Canada

This submission is presented following decisions 6/COP.3 and 20/COP.3, and specifically pursuant to decision 20/COP.4 of the Conference of the Parties to the Convention to Combat Desertification, which requests Parties to provide written comments on the questions of procedures for the resolution of questions of implementation under article 27 of the Convention. Submissions were also invited on the two draft annexes on arbitration and conciliation procedures under article 28 of the Convention. Canada will not elaborate on article 28 arbitration and conciliation annexes in this submission.

Procedures for the resolution of questions of implementation under article 27

As requested in decision 20/COP.3, Canada forwarded to the secretariat its views on procedures for the resolution of questions of implementation under article 27. In that submission, Canada noted that these procedures are closely related to the procedures for the review of the implementation of the Convention, addressed in decision 6/COP.3. Canada suggested that an ad hoc working group (AHWG) could be formed to address overall implementation review and also reflected the view that procedures for arbitration and conciliation under article 28 need to be separate from implementation review.

Given our experience in the AHWG and the Panel of Legal Experts at COP.4, Canada's position has evolved. As noted previously, it is difficult to foresee with certainty what type of questions might arise with respect to implementation. But it is now clear to Canada that a single procedure will not be sufficient to address issues of implementation relating to both articles 22 and 27.

Therefore, Canada would suggest that the elaboration of separate procedures is required. Issues relating to procedures for the review of the implementation of the Convention should be separate from procedures to address issues relating to article 27, pursuant to decisions 20/COP.4 and 20/COP.3. The article 27 procedure should address questions of implementation by specific Parties, while another procedure should deal with general questions of implementation for the Convention as a whole. (In this regard Canada has also submitted its views pursuant to decision 3/COP.4.) It may be useful for Parties to address procedures relating to general implementation review first, as this process is likely to generate valuable experience and understanding which will be useful in the elaboration of procedures for article 27.

For Canada, there are important distinctions to be made between the procedures for the resolution of questions of implementation for article 27 and procedures for the review of the implementation of the Convention. These distinctions raise a number of issues which will need further consideration. Canada will not elaborate on these issues in this submission, but notes that with respect to article 27 such issues may include linkages to the COP, the secretariat, the

general implementation review mechanism, and other Convention bodies, as well as timing, operating principles, composition, participation of non-Parties, triggers to initiate review, and the substantive basis of review.

2. Jordan

A. Article 27 of the Convention to Combat Desertification states that the Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention.

Comments

1. For our part, in general we welcome and support this proposal, which reflects a new feature in environmental conventions, namely the implementation of effective measures prior to the commencement of official procedures for the settlement of disputes.

2. We believe that use could be made of the precedents set in other environmental conventions. In general, procedures and mechanisms for the resolution of questions arising with regard to the implementation of this Convention could be strengthened through consultation in order to help States parties to overcome any implementation difficulties that they might encounter and, consequently, to pre-empt any disputes. To ensure more positive results, these procedures should be of a transparent and uncomplicated nature.

3. We believe that issues could be referred to a multilateral consultative standing committee, as provided for in the United Nations Framework Convention on Climate Change, the practical function of which would be to clarify and resolve issues and advise on the technical and financial resources needed for the settlement of problems that might arise and on the securing and deployment of those resources.

4. The Conference of the Parties should be competent to take measures in the event of protests, including protests against the manner of implementation by any Party or group of Parties.

5. We propose the establishment of a standing committee, elected on the basis of equitable geographical distribution and consisting of eight members with a high level of experience in this field, to monitor implementation. This committee, which would elect its chairman and vice-chairman, would meet at least once every year unless it decided otherwise. Its meetings would be organized by the secretariat.

B. The practical questions of a specialized technical nature which can be found in document ICCD/COP(4)/8, section F (a) to (l) "Relevant Considerations", should be answered by experts on environmental affairs.

B. Relevant precedents

The most relevant precedents relating to article 27 of the UNCCD include the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), the 1994 Protocol on Further Reductions of Sulphur Emissions (the Second Sulphur Protocol) to the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP), and article 13 of the United Nations Framework Convention on Climate Change (UNFCCC).

While the few existing precedents provide some legal bases for giving effect to article 27 of the UNCCD, they must be examined with caution. The balance of obligations varies from one treaty to another. Hence, the procedures and institutional mechanisms need to be tailored to suit individual treaties. The following review of relevant precedents should therefore be examined with this in mind.

It is to be noted from the outset that the Parties to the Montreal Protocol, the Second Sulphur Protocol and the UNFCCC have all decided that their respective "resolution of questions" regimes shall apply without prejudice to the provisions of dispute settlement procedures already existing in the individual treaties.

1. Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol)

As stated in last year's report on compliance regimes (ICCD/COP(4)/8), the full non-compliance procedure of the Montreal Protocol was created by decision IV/5 at the fourth meeting of the Parties to that Protocol (UNEP/OzL.Pro.4/15). The Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance established in September 1997 by decision IX/35 of the Parties to the Protocol had the task of reviewing this procedure (UNEP/OzL.Pro.9/12).

The non-compliance regime of the Montreal Protocol is not an evolving procedure, having been in operation for the last 10 years. It is fully operational, reviewed as and when Parties deem it appropriate. In this regard, it is important to note that the Meeting of the Parties also agreed to conduct the first review, unless the Parties decide otherwise, of the operation of the non-compliance procedure no later than the end of 2003.

2. Convention on Long-Range Transboundary Air Pollution (LRTAP)

As mentioned in ICCD/COP(4)/8, the Implementation Committee received a first case concerning compliance with provisions of the 1994 Oslo Protocol on Further Reduction of Sulphur Emissions. The submission was concerned with sulphur emissions rates of one coal-fired power plant that could be in violation of a sulphur emission limit value required under the Protocol as of 2004. The Committee discussed in depth the legal and other aspects raised by the submission from the interested country Party and prepared a recommendation to the Executive Body for the Convention. In turn, the Executive Body adopted the recommendations of the Implementation Committee, particularly stating that Slovenia could not be in non-compliance prior to its obligations before 1 July 2004 and noting the Party's intention to adopt

an ecological action programme to reduce sulphur emissions. The Executive Body also invited the Parties to the Oslo Protocol to examine ways in which they could assist Slovenia in reducing emissions from its thermal power plant.

In view of the non-compliance with reporting obligations on strategies and policies for air pollution abatement and emission data by some Parties, the Executive Body also adopted the recommendation of the Committee that urges non-complying Parties to provide as soon as possible, but no later than 31 January 2001, all the missing information on their national emissions, particularly their respective base year data.

The Executive Body also adopted the conclusions of the Committee's summary report on compliance with the emission reduction obligations of the 1985 Helsinki Protocol on Reduction of Sulphur Emissions or Their Transboundary Fluxes and of the 1998 Sofia Protocol concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes.

3. United Nations Framework Convention on Climate Change (UNFCCC)

Pursuant to article 13 of the UNFCCC, the fourth Conference of the Parties considered the adoption of a multilateral consultative process (MCP) for the resolution of questions regarding implementation of the UNFCCC. The proposed MCP is to be facilitative, non-judicial, transparent, cooperative and timely in manner. The MCP includes the establishment of a standing multilateral consultative committee to provide assistance to Parties to overcome difficulties with implementation of the Convention and prevent disputes from arising[3].

It should be said that Parties have not yet agreed on the composition of the committee, the period of time for which its members will serve, how they shall rotate and how equitable geographical distribution should be understood. The COP of UNFCCC at its fourth session considered the final report of the Ad Hoc Group on Article 13 and decided partially to approve the text of the multilateral consultative process prepared by the Ad Hoc Group on Article 13, with the exception of the issues concerning the constitution of the members of the multilateral consultative committee and how they should be designated among Annex I Parties and Parties not included in Annex I to the Convention[4].

C. New developments

1. Kyoto Protocol to the United Nations Framework Convention on Climate Change

The Kyoto Protocol introduces quantified emission limitation or reduction commitments for developed countries; there are no new commitments for developing countries. The Protocol provides for a comprehensive reporting mechanism. Each Party listed in Annex 1 will report annually the greenhouse gas inventory and any necessary supplementary information for the purpose of ensuring compliance with article 3 (quantified emission limitation and reduction commitments).

The COP also has to approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Kyoto Protocol, including through the development of an indicative list of consequences, taking into account the cause, degree and frequency of non-compliance. Any such procedures and mechanisms entailing binding consequences are to be adopted by means of an amendment to the Protocol. The text under negotiation provides for a Compliance Committee, with a facilitative and an enforcement branch, as well as consequences of non-compliance with the Committee for the quantified targets. The facilitative branch is to provide advice, assistance and recommendations to the Party concerned; the enforcement branch is to make a determination and impose consequences of non-compliance with the quantified target-related obligations.

In brief, UNFCCC continues working on the procedures and mechanisms of a compliance system under the Kyoto Protocol. Consensus is being achieved in several key issues which pave the road towards a comprehensive and somewhat innovative compliance system.

2. Cartagena Protocol on Biosafety to the Convention on Biological Diversity

Biosafety is one of the issues addressed by the Convention on Biological Diversity. This concept refers to the need to protect human health and the environment from the possible adverse effects of the products of modern biotechnology.[5] The Conference of the Parties to the Convention on Biological Diversity decided to establish an Open-ended Ad Hoc Working Group on Biosafety to develop a draft protocol on biosafety, specifically focusing on transboundary movement of any living modified organism resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity taking into account risks to human health (decision II/5).

As stated in article 34 (compliance) of the Protocol, the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP-1) considered, at its first meeting, the issue of cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and address cases of non-compliance. It is important to note that it was decided that the compliance procedure shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms.

The ICCP invited Parties to the Convention and Governments to forward their views in writing to the Executive Secretary regarding elements and options for a compliance regime under the Cartagena Protocol on Biosafety. The ICCP also requested the UNCBD Executive Secretary to organize, in consultation with the ICCP Bureau, an open-ended meeting of experts, back to back with the second meeting of the ICCP to review the synthesis report to be prepared by the Executive Secretary. The meeting will be held in Nairobi, Kenya, from 1 to 5 October 2001.

3. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The Convention on Access to Information was adopted by the Environment for Europe Conference held from 23 to 25 June 1998. It should be borne in mind in considering the possible relevance of this Convention that it relates to a restricted geographic area and has yet to enter

into force. Article 15 of that Convention provides for reviewing compliance by requiring the Meeting of the Parties to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance. The arrangements are to allow for appropriate public involvement and may include the option of considering communications from members of the public on matters relating to that Convention.

4. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

Another example for a compliance regime in the making lies in article 17 of the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. This latter convention was adopted and opened for signature in Rotterdam from 10 to 11 September 1998. The Convention on Prior Informed Consent also envisages the development of a non-compliance regime. Its article 17 requires the governing body of the Convention concerned, as soon as practicable, to develop and approve procedures and institutional mechanisms for determining non-compliance with the Convention and for treatment of Parties found to be in non-compliance.

A draft outline for these procedures was presented by the interim secretariat of the Rotterdam Convention at the 7th meeting of the Intergovernmental Negotiating Committee (INC), and comments from Parties were requested. A document summarizing these comments will be discussed at the 8th Intergovernmental Negotiating Committee in October 2001. Having not yet entered into force, the Rotterdam Convention's possible impact on the UNCCD remains to be seen.

III. CONSIDERATION OF ANNEXES CONTAINING ARBITRATION AND CONCILIATION PROCEDURES

A. Submissions by Parties

1. Burkina Faso

Observations on article 28 of UNCCD regarding the settlement of disputes

We have the following observations regarding the analysis of article 28 of the Convention to Combat Desertification, on the settlement of disputes, which is to be submitted to the Conference of the Parties for possible amendment:

Provisions of the article

Paragraph 2 of article 28 states: "When ratifying, accepting, approving, or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

"(a) Arbitration in accordance with procedures adopted by the Conference of the Parties in an annex as soon as practicable;

"(b) Submission of the dispute to the International Court of Justice."

Paragraph 6 states: "If the Parties to a dispute have not accepted the same or any procedure pursuant to paragraph 2 and if they have not been able to settle their dispute within 12 months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute, in accordance with procedures adopted by the Conference of the Parties in an annex as soon as practicable".

Analysis of the procedures

(a) Settlement by arbitration

In international practice, settlement by arbitration gives States freedom in the choice of arbitrators. The mandatory force of a decision handed down in settlement by arbitration does not in any way vitiate the expression by States of their sovereignty. The flexibility built into the procedure means that States may elect not to apply it when they wish to avoid a decision which would not serve their interests.

(b) Decisions of the International Court of Justice

Decisions of the International Court of Justice provide a form of judicial settlement. They belong to a judicial procedure which is both lengthy and rigid. The rules are pre-established and immutable and no State is able to derogate from them.

By bringing their dispute to the International Court of Justice States ipso facto agree to be strictly shackled by its decisions. The sovereignty of States crumbles before the authority of the International Court of Justice. Yet it is the prerogative of States to be able at any time and under any circumstances to affirm their sovereignty. Sovereignty is like a shield which protects them against over-powerful partners or adversaries.

(c) Conciliation

Conciliation, which is underpinned by negotiation, employs political procedures which are designed to reconcile the opposing interests of Parties without imposing a binding decision on them. This is a flexible procedure which seeks to ensure an equitable balance and a peaceful settlement of disputes.

Given the importance of UNCCD and the high stakes involved, particularly with regard to the obligations of developed country Parties under, for example, the provisions relating to financial mechanisms, it is essential that annex (a) (relating to arbitration) and annex (b) (relating to conciliation) incorporate provisions designed to safeguard interests which, regrettably, have been placed in jeopardy during the Convention's implementation phase, owing to the lack of financial resources.

The attitude of the developed country Parties to the implementation of financial mechanisms is both injurious to the Convention itself and to the interests of affected developing country Parties and, in particular, African countries. This attitude could also be the source of numerous disputes.

Accordingly, the procedures of settlement by arbitration and conciliation should be favoured as far as possible, even though conciliation is specific and is applied in the context of failure by Parties to accept the procedures provided in paragraph 2.

Conciliation commission or committee

The procedure of settlement by a conciliation commission or committee should incorporate the following elements:

- The composition of the conciliation commission or committee;
- The powers of the conciliation commission or committee;
- The period set for the submission of a dispute to the conciliation commission or committee;
- The period set for the adoption of decisions by the conciliation commission or committee.

Composition of the conciliation commission or committee

The conciliation procedure could be entrusted either to a commission or to a committee tasked with studying the dispute in all its aspects and putting forward proposals. The composition of the commission or committee should take into account the interests of the Parties involved.

Powers of the conciliation commission or committee

The powers of the commission or committee should be sufficiently extensive to enable it to conduct inquiries and to gather the necessary information.

Period set for the submission of a dispute to the conciliation commission or committee

This period could be six months. In other words, if Parties have been unable to settle their dispute within a period of six months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation.

Period set for the adoption of a decision by the conciliation commission or committee

A period of six months could be set for the adoption by the commission or committee of its decision. In any event, the period elapsing between the submission of the dispute to the commission or committee and the adoption of its decision should not exceed 12 months.

Accordingly, paragraph 6 could be reworded as follows:

"If the Parties to a dispute have not accepted the same or any procedure pursuant to paragraph 2 and if they have not been able to settle their disputes within six months following notification by one Party to another that a dispute exists between them, the dispute shall be submitted to conciliation at the request of any Party to the dispute in accordance with the procedure adopted.

"In any event, the period set for the arbitrators to reach their decision may not exceed six months from the date of the submission of the dispute to the arbitrators by the Parties to the dispute".

Court of arbitration

Settlement of a dispute by a court of arbitration should incorporate the following elements:

- The structure of the arbitration body;
- The powers of the arbitration body;
- The applicable law;
- The arbitration procedure;
- The arbitration finding.

Structure of the arbitration body

This could consist of a single arbitrator a joint commission, or a judicial arbitration panel (comprising five members, three of whom are neutral and two designated by the Parties).

Powers of the arbitration body

The instruments establishing the arbitration body should vest in it wide powers of interpretation.

Applicable law

The arbitrator must apply international law but shall also be able to apply special rules. In this case, it will be these rules which prevail.

Arbitration procedure

The arbitration procedure will be the rules of procedure established in the instrument constituting the arbitration body. In the absence of written rules, the arbitration body will have the authority to determine exactly how the arbitration proceeds.

Arbitration finding

In contrast to the conciliation procedure, which has limited scope and is not binding on the Parties, the arbitration finding is binding.

2. Jordan

With regard to the two draft annexes on arbitration and conciliation pursuant to article 28 of the Convention, on the whole we have no profound observations or divergent opinions since the two draft annexes are based on precedents set in treaties dealing with environmental affairs. However, we wish to make the following comments on the annexes in question:

1. The draft annex concerning arbitration

Article 2, paragraph 1 (d): We propose that the term "ta'widh" (compensation) [in the Arabic version] be replaced by the term "islah dharar" (reparation), which covers the essence of the claim.

Article 2, paragraph 2: The role of the tribunal, after its formation, in determining ("tahdid") the subject matter of the dispute requires interpretation. Does "tahdid" imply "descriptive designation"?

Article 2, paragraph 3: We propose that this paragraph be reworded to read as follows: "The secretariat shall inform all Parties to the Convention of the subject matter of the dispute in order to give them an idea thereof while, at the same time, maintaining confidentiality."

Article 3, paragraph 1: We propose that this paragraph should read as follows: "... a tribunal shall be established consisting of five members, two of whom shall be appointed by the parties to the dispute, two others not being nationals of the parties to the dispute, nor having their usual place of residence in the territory of one of the parties, nor being employed by any of them, nor having dealt with the case in any other capacity" in order to allow monitoring by the States parties and broaden the scope of transparency.

Article 3, paragraph 2: We propose that the expression "shall appoint" be replaced by "may appoint" so that the text will read as follows: "In disputes between more than two parties, parties having the same interest may appoint one arbitrator jointly by agreement" in order to avoid the formation of a tribunal in an illogical manner.

Article 5: We propose that the expression "and the principles of justice and equity" be added to the article so that the law to be applied would include these principles in addition to the provisions of the Convention and international law.

Article 8, paragraph 1: We propose that the expression "recommend essential interim measures" be replaced by the expression "order essential interim measures", since a recommendation concerning interim measures might render them meaningless, especially if the measures, in themselves, were of an urgent and imperative nature.

2. The draft annex concerning conciliation

Article 3, paragraph 1: we propose that the Commission be composed as follows:

"The Commission shall, unless the Parties otherwise agree, be composed of five members, two appointed by each Party concerned, another two being chosen from a list of not more than five juristically qualified conciliators compiled in advance by the Secretary-General of the United Nations, and a president, chosen jointly by those members, who shall not be a national of any of the Parties to the dispute, nor have his or her usual place of residence in the territory of one of these Parties, nor have dealt with the case in any other capacity."

We propose the addition of an article 15 which would read as follows: "The conciliation procedures shall terminate when a settlement has been reached, when the Parties have accepted an agreed settlement to the dispute, in the event of one of them rejecting the solution in a written notification addressed to the Secretary-General of the United Nations, or on the expiration of a three-month period from the date on which the Commission's report is transmitted to the parties."

3. South Africa

ARBITRATION

Article 1

The claimant Party or Parties shall notify the secretariat that the parties are referring a dispute to arbitration pursuant to article 28. The notification shall state the subject matter of arbitration and include, in particular, the articles of the Convention, the interpretation or application of which are at issue. If the Parties do not agree on the subject matter of the dispute before the President of the tribunal is designated, the arbitral tribunal shall determine the subject matter. The secretariat shall forward the information thus received to all Parties to this Convention.

Article 2

1. In disputes between two Parties, the arbitral tribunal shall consist of three members. Each of the Parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the tribunal. The latter shall not be a national of one of the Parties to the dispute nor have his or her usual place of residence in the territory of one of those Parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

2. In disputes between more than two Parties, Parties with the same interest shall appoint one arbitrator jointly by agreement.

3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3

1. If the President of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a Party, designate the President within a further two-month period.

2. If one of the Parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other Party may inform the Secretary-General who shall make the designation within a further two-month period.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention and international law.

Article 5

Unless the Parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure. Subject to the rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate provided that the parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity of presenting its case.

Article 6

The arbitral tribunal may, at the request of one of the Parties, recommend interim measures of protection that it may deem necessary to preserve the respective rights of any Party or to prevent serious harm to the environment.

Article 7

The Parties to the dispute shall facilitate the work of the arbitral tribunal and in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Article 8

The Parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the Parties to the dispute in equal shares. The tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the Parties.

Article 10

Any Party having an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counter claims arising directly out of the subject matter of the dispute.

Article 12

Any award or other decision, on both procedure and substance of the arbitral tribunal, shall be made by a majority vote of the arbitrators.

Article 13

If one of the Parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other Party may request the tribunal to continue the proceedings and to make its award. Absence of a Party or a failure of a Party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

The tribunal shall render its final award in writing within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five months.

Article 15

The final award of the arbitral tribunal shall be confined to the subject matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

Article 16

The award shall be binding on the Parties to the dispute. It shall be without appeal unless the Parties to the dispute have agreed to advance to an appellate procedure.

Article 17

Any controversy which may arise between the Parties to the dispute as regards the interpretation or manner of implementation of the final award may be submitted by either Party for decision to the arbitral tribunal which rendered it. The Parties undertake to carry out the award without delay.

CONCILIATION

Article 1

A conciliation commission shall be created upon the request of one of the Parties to the dispute. The commission shall, unless the Parties otherwise agree, be composed of five members, two appointed by each Party concerned, and a President chosen jointly by those members.

Article 2

In disputes between more than two Parties, Parties with the same interest shall appoint their members of the commission jointly by agreement. Where two or more Parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3

If any appointments by the Parties are not made within two months of the date of the request to create a conciliation commission, the Secretary-General of the United Nations shall, if asked to do so by the Party which made the request, make those appointments within a further two-month period.

Article 4

If a President of the conciliation commission has not been chosen within two months of the appointment of the last of the members of the commission, the Secretary-General of the United Nations shall, if asked to do so by a Party, designate a President within a further two-month period.

Article 5

The conciliation commission shall take its decisions by majority vote of its members. It shall, unless the Parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the Parties shall consider in good faith.

Article 6

A disagreement as to whether the conciliation commission has competence shall be decided by the commission.

B. Relevant precedents and latest developments

1. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

In its article 20, paragraph 2 (a), the Rotterdam Convention provides for the adoption by the Conference of the Parties of an annex concerning arbitration procedures. In addition, article 20, paragraph 6, stipulates that an annex on procedures relating to a conciliation commission will be adopted by the Conference of the Parties no later than the second meeting of the Conference[6]. Work has started on these annexes, and drafts will be discussed at the eighth meeting of the Intergovernmental Negotiating Committee (INC) in October 2001.

As stated before, the Rotterdam Convention has not yet entered into force, and so possible impact of the annexes on the UNCCD remains to be seen.

2. Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration

Equally salient regarding the procedures of settlement of disputes is that the Permanent Court of Arbitration adopted the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment at the extraordinary meeting of the Administrative Council on 19 June 2001. In fact, this set of optional rules is based on the 1967 Arbitration Rules and the 1980 Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. The optional rules seek to make the fewest possible changes from the 1967 Arbitration Rules and the 1980 UNCITRAL Conciliation Rules with the aim of facilitating consensual resolution of environmental disputes.

Until the adoption of these rules, there has been no unified forum to which States, intergovernmental organizations, non-governmental organizations, multinational corporations and private Parties could have recourse when they had agreed to seek resolution of controversies concerning environmental protection or conservation of natural resources[7]. The rules could be a useful reference point for the work of the group of experts on legal issues in that they seek to address the lacunae in environmental dispute resolution, especially in matters relating to the composition of the arbitral tribunal, arbitral proceedings and the binding effect of the award.

Notes

[1] For decisions of the Conference of the Parties at its second session, see document ICCD/COP(2)/14/Add.1.

[2] Reproduced without formal editing by the UNCCD secretariat.

[3] WT/CTE/W/191.

[4] FCCC/CP/1998/16/Add.1 and FCCC/AG13/1998/2.

[5] Cartagena Protocol on Biosafety, Introduction, www.biodiv.org (Web site).

[6] UNEP/FAO/PIC/INC.7/9 of 21 August 2000.

[7] Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, foreword.

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